

STATE OF MICHIGAN
COURT OF APPEALS

EMC INSURANCE COMPANY, as subrogee of
SCHMUCKAL OIL COMPANY,

Plaintiff-Appellee,

v

JEFFREY ROGER RICHTER,

Defendant-Appellant.

UNPUBLISHED
January 15, 2008

No. 267643
Ottawa Circuit Court
LC No. 05-052654-CZ

Before: White, P.J., and Saad and Murray, JJ.

WHITE, P.J. (*dissenting*).

Admittedly, this is a close case, presenting facts that fall near the periphery of the intended scope of the no-fault act. MCL 500.3101 *et seq.* I am, however, persuaded that the property damage arose out of the use of the motor vehicle as a motor vehicle, and therefore the damage is covered under § 3121 of the no-fault act.

I agree that *McKenzie v Auto Club Ins Ass’n*, 458 Mich 214; 580 NW2d 424 (1998), provides the most recent and useful statement of the scope of the act: “[T]he Legislature intended coverage of injuries [property damage] resulting from the use of motor vehicles when closely related to their transportation function and only when engaged in that function.” *Id.* at 220. In *McKenzie*, the court concluded that injury sustained as a result of carbon monoxide inhalation while sleeping in a camper/trailer attached to a pickup truck is insufficiently related to the transportation function of the motor vehicle because “[a]t the time the injury occurred, the parked camper/trailer was being used as sleeping accommodations,” and “[t]his use is too far removed from the transportation function to constitute use of the camper/trailer ‘as a motor vehicle’ at the time of injury.” *Id.* at 226.

Here, the truck was being used in its transportation capacity. Defendant needed to obtain gas for his boat. He used the truck to transport the gas from the gas station to the boat. Presumably he could not carry a 28-gallon container of gas to the boat and so borrowed the truck. The use to which the truck was being put was transportation. Thus, the damage occurred when the motor vehicle was being used as a motor vehicle.

The more difficult question is whether the damage *arose from* the use of the motor vehicle as a motor vehicle, i.e., whether there is the requisite causal connection between the

vehicle's use as a motor vehicle and the property damage. In this regard, the circuit court concluded, and the majority agrees, that the damage did not arise from the use of the motor vehicle as a motor vehicle, but rather from the manner in which gas was dispensed into the container, and that the motor vehicle was "merely the situs" of the fire. Again, this is a close question. However, I conclude that the link between the motor vehicle's transportation function and the damages was more than incidental or fortuitous.

The vehicle was the situs of the fire because of its transportation function. Defendant placed the container in the SUV in order to transport it to the gas station. While he should have removed it while filling it, he left it in the vehicle so that he could transport it back to his boat. The fire occurred as the result of a spark resulting from the build up of static electricity generated by the flow of gas into the container. The carpet or plastic bed in the cargo area prevented the static charge from grounding. Most SUVs are manufactured and sold with either carpet or plastic in the cargo area. Thus, the fire was caused by the ungrounded nature of the motor vehicle.

I further observe that the record does not reveal whether the vehicle caught fire, exploded, and the explosion then caused the property damage, or whether the property damage resulted from the gas tank spark alone. If the former, there is even a stronger connection to the use of a motor vehicle as a motor vehicle, because motor vehicles are explosive due to their need to carry gas.

At a minimum, I would remand for further development of the record.

/s/ Helene N. White